(2)

Supreme Court, U.S.
FILED
AUG 27 2002
OFFICE OF THE CLERK

No. 02-206

In The

Supreme Court of the United States

WILLIAM J. CONERY,

Petitioner,

v.

JOHN NICCOLLAI, JR., individually and in his official capacity as President of Local 464A, Food and Commercial Workers Union, AFL-CIO, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION

JOHN M. AGNELLO, ESQ.
Counsel of Record
MELISSA E. FLAX, ESQ.
CARELLA, BYRNE, BAIN, GILFILLAN, CECCHI, STEWART & OLSTEIN
6 Becker Farm Road
Roseland, New Jersey 07068
(973) 994-1700
Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

46 pp

COUNTERSTATEMENT OF QUESTIONS PRESENTED

Whether the Third Circuit correctly affirmed the District Court's entry of summary judgment in favor of Respondents dismissing all of Petitioner's claims alleging violations of §101(a)(1) and §101(a)(2) of the Labor Management Reporting and Disclosure Act.

LIST OF PARTIES

Petitioner:

WILLIAM J. CONERY

Respondents:

JOHN NICCOLLAI, JR., individually and in his official capacity as President of Local 464A, Food and Commercial Workers Union, AFL-CIO; Ramon Rando, individually and in his official capacity as Secretary-Treasurer of Local 464A; Griff McElroy, individually and in his official capacity as Recorder of Local 464A; George Plesa, individually and in his official capacity as Chairman of the Executive Board of Local 464A; Frank Hanley, individually and in his official capacity as Contract Administrator; Frank Dichristina, Donald Ligon, William Wriker, individually and in their official capacities as Business Agents of Local 464A; United Food Commercial Workers Union, AFL-CIO; Walter Biernacki, individually and in his official capacity as Vice President of Local 464A; Wayne Williams, individually and in his official capacity as Director – Pension & Prescription Benefits of Local 464A; John T. Niccolai, Sr., individually and in his capacity as Trustee of the Local 464A Pension Fund; Local 464A, United Food and Commercial Workers International Union, AFL-CIO; Local 464A Pension Fund Administrator and Board of Trustees; Martin Quinn, in their capacity as administrators and trustees of the Local 464A Pension Fund; Gilbert C. Vuolo, in their capacity as administrators and trustees of the Local 464A Pension Fund; Dewey Cannella, in their capacity as administrators and trustees of the Local 464A Pension Fund; Isadore Zalkin, in their capacity as

LIST OF PARTIES – Continued

administrator and trustee of the Local 464A Pension Fund

Consolidated Plaintiffs

Frank A. Fusco; Kenneth Burdge

Defendant in District Court

Shoprite Supermarkets, Inc.

Third Party Defendants in the District Court

Harold Krieger, The Estate of Harold Krieger, Stephanie Krieger, Lowell Harwood, as Executors of the Estate of Harold Krieger

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, the Respondents disclose that they are individuals and a labor union and as such have no publicly held companies that hold 10% or more of their stock.

TABLE OF CONTENTS

	Page
COUNTERSTATEMENT OF QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
CORPORATE DISCLOSURE STATEMENT	iii
COUNTERSTATEMENT OF JURISDICTION	1
COUNTERSTATEMENT OF THE CASE	1
Nature of the Case	1
Proceedings Below and Disposition	1
Facts Material to the Conery §101 Complaint	4
A. Local 464A and Its Officers	4
B. Conery's Union Membership	4
C. Conery's Work and Disciplinary History with ShopRite	5
D. Conery's Participation in the Democratic Process of the Union	6
1. Conery's Union Positions	6
2. Conery's Political Literature	6
3. Conery's Participation in Union Elections	7
(a) The 1989 Contested Union Election	7
(b) The 1992 Contested Union Election	8
(c) The 1995 Uncontested Union Election	11
E. Conery's Legal Actions Against Local 464A and Others	11
1. Conery's Unfair Labor Practice ("ULP") Charges	11

TABLE OF CONTENTS – Continued

Page

2. Conery's Internal Union Charges 13

3. Conery's Complaints to Governmental Agencies 13

F. Incidents Which Conery Claims Violate His Protected Rights 14

1. The Passaic Municipal Court Action 14

2. Conery's Handbilling on October 21, 1991 .. 15

3. DiChristina Remarks 16

4. Local 464A's Complaint in the District Court 16

ARGUMENT 17

I. THE THIRD CIRCUIT PROPERLY APPLIED THE SUPREME COURT'S RULINGS IN *CALHOON* AND *LYNN* IN AFFIRMING THE DISTRICT COURT'S DISMISSAL OF PETITIONER'S CLAIMS UNDER LMRDA §101(a)(1) AND §101(a)(2) 17

A. The Third Circuit Correctly Affirmed the Dismissal of Petitioner's Claims Alleging Violations of §101(a)(1) 18

B. The Third Circuit Correctly Affirmed the Dismissal of Petitioner's Claims Alleging Violations of §101(a)(2) 20

II. THERE IS NO CONFLICT BETWEEN THE THIRD CIRCUIT'S RULING IN THIS CASE AND DECISIONS IN OTHER CIRCUITS INTERPRETING LMRDA §101(a)(1) AND §101(a)(2) 22

TABLE OF CONTENTS – Continued

Page

A. Petitioner's §101(a)(1) Argument is Meritless 22

B. The Third Circuit Did Not Rule That §101(a)(2) Applies Only In the Context of Union Election 24

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES:

Aircraft Mechanics v. Transport Workers Union, 98 F.3d 597 (10th Cir. 1996).....28, 29

Black v. Ryder/P.I.E. Nationwide, 970 F.2d 1461 (6th Cir. 1992).....29

Burroughs v. Operating Engineers Local Union No. 3, 686 F.2d 723 (9th Cir. 1982).....22

Calhoon v. Harvey, 379 U.S. 134, 13 L.Ed. 2d 190, 85 S. Ct. 292 (1964), *reh. den.* 379 U.S. 984, 13 L.Ed. 2d 577, 85 S. Ct. 639 (1965).....*passim*

Finnegan v. Leu, 456 U.S. 431 (1982).....20, 21

Guidry v. International Union of Operating Engineers, Local 406, 882 F.2d 929 (5th Cir. 1989).....27

Guzman v. Bevona, 90 F.3d 641 (2d Cir. 1996).....27, 28, 29

Hall v. Cole, 412 U.S. 1, 93 S. Ct. 1943 (1973).....22

International Brotherhood of Boilermakers, et al. v. Braswell, 388 F.2d 193 (5th Cir.), *cert. den.*, 391 U.S. 935 (1968).....22

Marshall v. Local 1010, 498 F. Supp. 368 (N.D. Ind. 1980), *aff'd* 664 F.2d 144 (7th Cir. 1981).....23

Newman v. Local 1101, Communications Workers, 570 F.2d 439 (2d Cir. 1978).....28

Schuchardt v. Millwrights & Machinery Erectors Local No. 2834, 380 F.2d 795 (10th Cir. 1967).....22, 23

Sheet Metal Workers v. Lynn, 488 U.S. 347, 102 L.Ed. 2d 700, 109 S. Ct. 639 (1989).....17, 18, 20, 21, 28

TABLE OF AUTHORITIES – Continued

Page

Smith v. United Mine Workers, 493 F.2d 1241 (10th Cir. 1974) 22, 23

Teamsters Joint Council No. 42 v. IBT, AFL-CIO, 82 F.3d 303 (9th Cir. 1996) 21

STATUTES

28 U.S.C. §1254(1) 1

28 U.S.C. §1331 1

29 U.S.C. §411(a)(1) 18

29 U.S.C. §411(a)(2) 20

29 U.S.C. §412 1

COUNTERSTATEMENT OF JURISDICTION

The District Court had subject matter jurisdiction over the matters presented to this Court for review under 28 U.S.C. §1331 and 29 U.S.C. §412. This Court has jurisdiction with respect to the Petition for Writ of Certiorari pursuant to 28 U.S.C. §1254(1).

COUNTERSTATEMENT OF THE CASE

Nature of the Case

Petitioner, William J. Conery ("Conery"), seeks review of the dismissal of his claims alleging violations of §§101(a)(1) and (2) of the Labor Management Reporting and Disclosure Act ("LMRDA").

Proceedings Below and Disposition

Conery filed the underlying complaint, *Conery v. John Niccollai, Jr., et al,* Civil Action No. 92-840 ("Conery §101 Complaint"), on February 24, 1992. The Conery §101 Complaint was consolidated with an action commenced by Frank A. Fusco ("Fusco") and Kenneth Burdge ("Burdge") entitled *Frank A. Fusco and Kenneth Burdge v. John T. Niccollai, Jr., et al.,* Civil Action No. 92-1458 (the "Fusco/Burdge §101 Complaint"). By order dated October 16, 1992, the Conery §101 Complaint and the Fusco/Burdge §101 Complaint were consolidated with an action entitled *Kenneth Burdge and Frank A. Fusco v. John T. Niccollai, Jr., et al.,* Civil Action No. 92-1929 (the "Fusco/Burdge §501 Complaint").

On February 2, 1993, a Stipulation of Dismissal was filed dismissing all claims asserted by Conery against defendant ShopRite Supermarkets (the Eighth and Tenth Causes of Action in the Conery §101 Complaint). On August 2, 1994, a Stipulation and Order was entered

dismissing Conery's claims against the Respondents[1] in the Seventh and Ninth Causes of Action in the Conery §101 Complaint.[2] On September 27, 1994, partial summary judgment was entered in favor of Respondents dismissing the Eleventh and Twelfth Causes of Action in the Conery §101 Complaint.[3]

On December 14, 1995, an order was entered allowing Conery to file a First Amended Complaint which added a thirteenth cause of action. Conery's amended complaint was filed on January 16, 1996 at which point the Conery §101 Complaint consisted of the First, Second, Third, Fourth, Fifth, Sixth and Thirteenth Causes of Action.

In February 1996, the respondents filed motions for summary judgment seeking dismissal of:

- the remaining claims in the Conery §101 Complaint;
- the Fusco/Burdge §101 Complaint;[4] and
- the Fusco/Burdge §501 Complaint.

The District Court Judge referred all of the summary judgment motions to the Magistrate Judge for Report and Recommendation ("Report").

---

[1] References to "Respondents" mean all defendants in the Conery §101 Complaint except ShopRite Supermarkets, Inc.

[2] Conery's Seventh, Eighth, Ninth and Tenth Causes of Action which were voluntarily dismissed at the District Court level, were not appealed to the Third Circuit and are thus not the subject of this Petition.

[3] The District Court's dismissal of Conery's Eleventh and Twelfth Causes of Action was appealed to the Third Circuit. The dismissal of those causes of action was affirmed by the Third Circuit. Petitioner does not seek review of the Third Circuit's action with respect to those causes of action.

[4] Local 464A also moved for partial summary judgment of liability against Fusco on its counterclaim in the Fusco/Burdge §101 Complaint. Fusco moved for summary judgment seeking dismissal of Local 464A's counterclaim. Local 464A's motion was granted; Fusco's motion was denied.

On January 14, 1998, the Magistrate Judge issued his Report (Pet. App. at 12a) with regard to the Conery claims in which he recommended the entry of summary judgment dismissing all remaining claims in the Conery §101 Complaint.[5] An objection to the Report was filed by Conery. The Respondents filed a response to Conery's objection.

The District Court Judge conducted a *de novo* review of the record, and by order dated March 31, 1998, adopted the Magistrate Judge's Report and entered summary judgment in favor of the Respondents, dismissing all remaining claims in the Conery §101 Complaint. (Pet. App. at 10a).

On July 12, 2001, Conery filed a Notice of Appeal in the Third Circuit limited to the orders granting summary judgment in favor of the respondents dismissing the First, Fourth, Fifth, Eleventh, Twelfth and Thirteenth Causes of Action in the Conery §101 Complaint.

On September 27, 2001, the District Court Judge entered a Rule 58 Judgment to resolve a jurisdictional issue raised by the Third Circuit *sua sponte*. (Resp. App. at 1-2).

On April 4, 2002, the Third Circuit entered a judgment intended to affirm the dismissal of the First, Fourth, Fifth, Eleventh, Twelfth and Thirteenth Causes of Action (Pet. App. at 9a) but which inadvertently referenced the summary judgment order dated March 31, 1998 instead of the Rule 58 Judgment. On April 18, 2002, Conery filed a Petition for Rehearing and for Rehearing En Banc. On May 9, 2002, the Third Circuit entered an order denying Conery's rehearing petition.

On May 28, 2002, the Third Circuit entered an amended judgment, substituting a reference to the Rule 58

---

[5] The Magistrate Judge also issued a Report recommending dismissal of the Fusco/Burdge §101 Complaint and the Fusco/Burdge §501 Complaint. The District Court adopted the Magistrate's recommendation and entered summary judgment dismissing both the Fusco/Burdge §101 Complaint and the Fusco/Burdge §501 Complaint.

Judgment in place of the reference to the March 31, 1998 summary judgment order contained in the April 4, 2002 Judgment. (Resp. App. at App. 3-7).

Facts Material to the Conery §101 Complaint

A. Local 464A and Its Officers

United Food and Commercial Workers International Union, Local 464A ("Local 464A" or "Union") is a labor organization with offices located in Little Falls, New Jersey.

At times relevant to the Conery §101 Complaint, Local 464A's membership consisted of approximately 18,250 full-time and part-time active members. Local 464A's members include butchers, as well as meat, deli and fish department employees in supermarket chains, such as A&P, ShopRite, Pathmark and Kings. Its membership also includes employees working for employers in the meat processing and distribution industry.

At all times relevant to the Conery §101 Complaint, the following Respondents held the Local 464A offices/positions indicated:

President	-	John T. Niccollai, Jr. ("Niccollai")
Secretary/Treasurer	-	Ramon Rando ("Rando")
Recorder		Griff McElroy ("McElroy")
Vice President	-	Walter Biernacki ("Biernacki")
Business Agent	-	Frank DiChristina ("DiChristina")

B. Conery's Union Membership

Conery is a butcher. He joined Local 464A in 1956. In October 1961, Conery took a withdrawal card from Local 464A. In September 1966, Conery was reinstated as an active member of Local 464A.

C. Conery's Work and Disciplinary History with ShopRite

1973 In February 1973, Conery was hired by ShopRite. Conery received employee warning notices for, *inter alia,* poor work performance and poor attitude on November 12, November 20, and December 20, 1973.

1974 On November 9, 1974, Conery received an employee warning notice for poor work performance and poor attitude. On November 11, 1974, Conery's employment with ShopRite was terminated. On November 19, 1974, Local 464A grieved Conery's termination. On December 5, 1974, Conery wrote to Local 464A thanking Local 464A for its actions on his behalf. Due to the efforts of Local 464A, Conery's discharge/termination was, by arbitration award, converted to a suspension.

1975 Conery received employee warning notices for poor work performance, poor attitude and insubordination on February 11 and April 11, 1975.

1977 On April 18, 1977, Conery received an employee warning notice for insubordination and other work infractions.

1980 Conery received employee warning notices for poor work performance, poor attitude and other work infractions on January 28, March 19, and October 6, 1980. On December 14, 1980, Conery received a one (1) day suspension. On January 20, 1981, Local 464A grieved Conery's suspension and settled the matter with his employer, ShopRite.

1981 On October 13, 1981, Conery was demoted. Local 464A grieved Conery's demotion. On November 9, 1981, Conery wrote to Local 464A again thanking Local 464A for its actions on his behalf. Due to Local 464A's efforts, Conery's demotion was, by arbitration award, set aside and Conery was awarded back pay.

1982 to 1996 Conery's disciplinary problems with ShopRite continued from 1982 to the date of the filing of the summary judgment motions, resulting in dozens of disciplinary actions by ShopRite against Conery, as well as

charges filed by Conery against ShopRite with the NLRB and claims asserted against ShopRite by Conery in the Conery §101 Complaint.

D. Conery's Participation in the Democratic Process of the Union

1. Conery's Union Positions

In April 1987, Conery was elected to Local 464A's Contract Negotiation Committee. Additionally, Conery served as a shop steward for a period of time while employed by ShopRite.

2. Conery's Political Literature

Conery expressed his views, arguments and opinions regarding the incumbent Local 464A officers and their management of the Union by, among other things, preparing and distributing to Local 464A members the following political literature:

Date	Title/Description
December 2, 1982	"Crisis in Confidence"
December 1982	Newspaper headlines and magazine excerpts
April 3, 1983	Untitled
April 29, 1987	Untitled
August 31, 1987	"Why Our Union Isn't Working For Us"
1987	"Union Renewal, We the People In Order To Form A More Perfect Union"
1987 and 1988	"Freedom"
Circa 1989 Election	"Enough is Enough"
Circa 1989 Election	"We Are Being Ripped Off By the Union Leadership"
Circa 1992 Election	"Support a Free and Democratic Union Join the Membership Solidarity"
Undated	"Members For Union Democracy – Bill Conery"
September 1994	"Put an End to Union Nepotism and join the N.U.T. Bill Conery"
Undated	"How Did They Do That" by Bill Conery

Undated	"Union Officials Have Sold Out, Betrayed the Membership, and Killed Your Job Security"
Undated	"Members For Union Democracy"
Undated	"Part-time Employees Are Being Ripped Off by This Union"
Undated	Conery literature copied onto NLRB official notice letterhead with NLRB seal
1992	"Union Renewal"
Undated	Modified version of 1987/1988 "Freedom"

3. Conery's Participation in Union Elections

(a) The 1989 Contested Union Election

In the 1989 Local 464A election, the following Local 464A members were nominated for the offices indicated and ran against the incumbents:

President	Sec.-Treas.	Vice President	Recorder
K. Burdge ("Burdge")	P. Gunnick ("Gunnick")	J. O'Brien ("O'Brien")	C. Malloy ("Malloy")

On the advice of one of his physicians, Conery did not run as a candidate in the 1989 election.[6] However, Conery, after his release from Carrier Clinic, campaigned, encouraged and supported the slate of candidates headed by Burdge.

The 1989 election was held on June 14, 1989. The incumbents were all re-elected. The tally was as follows:

President	V. P.	Sec.-Treas.	Recorder
Niccolla	Biernacki	Rando	McElroy
4421	4250	4266	4320
Burdge	O'Brien	Gunnick	Malloy
412	513	488	514

[6] Conery was hospitalized for psychiatric treatment at Riverview Medical Center from January 20, 1989 to February 1, 1989 and at Carrier Clinic from February 24, 1989 to April 5, 1989.

On June 23, 1989, Conery filed a written protest with the Chairman of the Election Committee regarding the 1989 election. By letter dated July 11, 1989, the Chairman denied Conery's protest. On July 5, 1989, Conery filed a protest of the 1989 election with the United Food and Commercial Workers International Union, AFL-CIO (the "International Union"). On October 6, 1989, after investigating Conery's complaints, the International Union denied Conery's protest.

On October 23, 1989, Conery wrote to the United States Department of Labor ("DOL") protesting the 1989 election. The DOL conducted a comprehensive investigation of all of Conery's complaints. As part of the DOL's investigation into the 1989 election, the DOL interviewed Conery; Niccollai; Burdge; Fusco; Gunnick; O'Brien; Louis Rocco; Bob Manigold, Election Committee Chairman; James Galvin; John DeDolce; Larry Hansen; Dan Thoma; Vincent Fomino; Harold Krieger, Esq., Manny DaSilva, John Alibrando and Bernard Mintz, Esq., attorney for the National Labor Relations Board, Region 22. The report of investigation contained thirty-five (35) Exhibits.

When Conery's co-plaintiff, Burdge, was interviewed by the DOL on November 7, 1989, he stated that he had actively campaigned in about twenty-six (26) stores with no problems.

In early 1990, based upon its comprehensive and thorough investigation of all of Conery's allegations, the DOL issued its written "Statement of Reasons" dismissing Conery's claims regarding the 1989 election.

(b) The 1992 Contested Union Election

The 1992 Local 464A election was conducted in June. Conery was nominated and ran for the office of President against the incumbent, Niccollai. Burdge and Lawrence Scancarella also ran against the incumbents.

The 1992 election results were as follows:

President		Secretary-Treasurer		Vice President	
Niccollai	2663	Rando	2626	Biernacki	2575
Conery	152	Burdge	167	Scancarella	201

On June 19, 1992, Conery protested the 1992 election in a letter to Robert Allen Page ("Page"), Election Committee Chairman. Conery's letter set forth twenty-five (25) separate complaints and enclosed a copy of the internal Union charges which Conery had filed on November 19, 1991 against the incumbents, Local 464A's Executive Board and others.

By letter dated June 23, 1992, Page responded to each and every one of Conery's twenty-five (25) complaints and advised Conery that his protest was denied.

On July 10, 1992, Conery protested the election to William Wynn ("Wynn"), the President of the International Union. By letter dated July 21, 1992, Wynn advised Conery that his appeal was out of time, but that he was nonetheless directing that Conery's allegations regarding the 1992 election be investigated and that a written decision would be rendered.

On July 27, 1992, Conery wrote to the International Union Executive Board appealing Wynn's determination that Conery's appeal to Wynn was out of time. Conery also wrote to Wynn requesting that he reconsider his earlier decision.

On August 3, 1992, Wynn wrote to Conery and advised him that his July 21, 1992 decision denying Conery's appeal as being out of time would stand, but reiterated that the International Union would conduct an investigation of his complaints and render a written opinion.

On September 8, 1992, the International Union issued a written opinion based upon its extensive investigation of Conery's complaints. The seven (7) page opinion addressed each and every one of Conery's allegations, concluded that there was no merit to any of Conery's claims and that the 1992 election was conducted properly.

On September 14, 1992, Conery wrote to the International Union Executive Board appealing the decisions contained in the July 21, August 3, and September 8, 1992 letters.

On September 17, 1992, the International Union wrote to Conery and advised him that the International

Executive Board had affirmed the decisions contained in the July 21 and August 3, 1992 letters. In addition, the September 17 letter advised Conery that the International Executive Board concurred with the findings contained in the International President's September 8 letter.

On September 21, 1992, Conery wrote to the DOL protesting the 1992 election and setting forth the same allegations as he had in his appeal to the Election Committee Chairman and the International Union. The allegations in the September 21 letter from Conery to the DOL are substantially the same allegations made by Conery in the Conery §101 Complaint.

As a result of Conery's September 21 letter, an investigation was commenced by the DOL. The investigation was conducted over a two (2) month period from September to November 1992. Twenty-seven (27) individuals were interviewed in the course of this investigation including Conery; Niccollai; Page; Bernard Mintz, attorney for the National Labor Relations Board, Region 22; Harold Krieger, Esq.; Frank DiChristina ("DiChristina"); Dr. Anthony Boni; a co-employee of Conery, referred to as "John Doe"; Robert Tracey; Frank Hanley ("Hanley"); Rando; Donald Ligon ("Ligon"); Walter Wriker ("Wriker"); Michael Koval ("Koval"); ShopRite officials, including David L. Williams, Vice President Human Resources, James Morrison, District Manager-Central Region and Robert J. Simmons, attorney for ShopRite Supermarkets, Inc.; Robin Johnson; William Clarke, Labor Relations Director, A&P; Frank Fusco; Lawrence Scancarella, candidate for Vice President in 1992 election; Andy Blanos, shop steward Netcong ShopRite; John Kovaleski, Vice President Human Resources, Mayfair Foodtown; Bill Vuolo, Vice President Labor Relations Grand Union; Francis Stinner, Passaic ShopRite steward; Frank Juba, Passaic ShopRite store manager; Jose Rosano, disqualified candidate for Recorder in the Local 464A 1992 elections; and Sal Scancarella.

At the conclusion of the DOL's investigation, the DOL issued a twenty (20) page report of investigation including

sixty-seven (67) exhibits and the Reports of Interview of each of the twenty-seven (27) interviewees. Each and every allegation set forth by Conery in his September 21, 1992 letter to the DOL was thoroughly and comprehensively investigated and reported on. Under letter dated August 12, 1993, the DOL forwarded to Local 464A its eight (8) page "Statement of Reasons" for dismissing Conery's complaint regarding the 1992 election. The Statement of Reasons made full findings with respect to each of Conery's complaints, again, many of which are the same complaints Conery raised in the Conery §101 Complaint.

(c) The 1995 Uncontested Union Election

The 1995 Local 464A election was uncontested. The incumbents were re-elected.

On May 8, 1995, Conery filed an objection to the Local 464A 1995 uncontested election claiming, *inter alia,* that his prosecution of the Conery §101 Complaint hindered his ability to participate in the election.

E. Conery's Legal Actions Against Local 464A and Others

1. Conery's Unfair Labor Practice ("ULP") Charges

Date	Charging Party	Respondent	Subject Matter of ULP Charge/Disposition
3/22/88	Conery	Local 464A	Feb. 1988 disciplinary charges by Union against Conery
11/3/88	Conery		Conery and Local 464A execute Settlement Agreement relating to 3/22/88 ULP charge
7/5/89	Conery	ShopRite and other supermarkets	Illegal restrictions regarding 1989 election

11/20/89	Conery	ShopRite	Warning notice and transfer
11/20/89	Conery	ShopRite and other supermarkets	Illegal restrictions regarding 1989 election
12/12/89	Conery	ShopRite	Warning notice, overtime, illegal practices
12/12/89	Conery	Local 464A	Failure to represent Conery on grievances against ShopRite
1/26/90	Conery		Conery withdraws 12/12/89 ULP charges against ShopRite and Local 464A
1/29/90	Conery	ShopRite	Same as 12/12/89 ULP charges and preventing distribution of campaign literature
1/29/90	Conery	Local 464A	Same as 12/12/89 ULP charges and preventing distribution of campaign literature
3/1/90	Conery	ShopRite	Amendment to 1/29/90 ULP charge
3/20/90	Conery	Local 464A	Local 464A's Complaint in U.S. District Court against Conery
8/28/90	Conery	Local 464A	Restraint on Union activities
9/17/90	Conery	Local 464A	Amending 8/28/90 ULP charge to include DiChristina's Municipal Court Complaint
11/28/90	Conery	Local 464A	2nd Amendment to 8/28/90 ULP charge
11/21/91	Conery	Local 464A	Dr. Boni's Municipal Court Complaint

On March 9, 1992, Judge Howard Edelman, A.L.J., approved and executed a Settlement Stipulation between Local 464A and Conery settling the charges filed by Conery on March 20, August 28, September 17 and November 28,

1990. On June 2, 1992, the NLRB approved the Settlement Stipulation and noted in its Decision and Order that Conery failed to execute the Settlement Stipulation.

Conery subsequently filed and withdrew additional charges as follows:

Date	Charging Party	Respondent	Subject Matter of ULP Charge/Disposition
8/17/92	Conery	ShopRite	Conery's suspension by ShopRite
8/17/92	Conery	Local 464A	Restraint in exercising Union rights
8/25/92	Conery	Local 464A	Interference w/Union rights
9/2/92	Conery	Garden State Sausage Co., Inc.	Interference with administration of Local 464A
9/2/92	Conery	Local 464A	Restraining members' rights
12/30/92			Conery withdraws all of the above listed ULP charges

2. Conery's Internal Union Charges

On November 19, 1991, Conery filed internal Union charges against the Local 464A Executive Board, Niccollai, Rando, Hanley, DiChristina, Wriker, Ligon, Koval and Ralph "X", charging those individuals with violating Conery's rights during the period from 1987 through 1991. On February 6, 1992, the Local 464A Trial Board conducted a plenary hearing on Conery's internal Union charges. Following the hearing and deliberation, the Trial Board concluded that Conery had failed to prove the charges and found all individuals who were charged by Conery innocent.

3. Conery's Complaints to Governmental Agencies

At various times during the period 1987 to 1989, Conery lodged complaints with the following agencies, claiming that Local 464A had violated his rights as a union member:

- The United States Department of Justice;
- The Federal Bureau of Investigation;
- The United States Attorney's Office for the District of New Jersey;
- The New Jersey Attorney General's Office

None of these agencies took any action against Local 464A as a result of the complaints made by Conery.

In a letter to the DOL dated June 30, 1988, Conery accused Niccollai, Rando, McElroy, Hanley and Business Agents, Harry Conforti ("Conforti") and Koval, of engaging in violent action against Conery. By letter dated August 22, 1988 to the DOL, Conery requested the United States Secretary of Labor remove Niccollai, Rando, McElroy, Hanley, Business Agents Conforti and Koval, as well as the entire Local 464A Executive Board from their respective positions with Local 464A. The DOL took no action against any of the individuals referred to in Conery's letters of June 30 and August 22, 1998.

F. Incidents Which Conery Claims Violate His Protected Rights

1. The Passaic Municipal Court Action

DiChristina was the Local 464A business agent assigned to the ShopRite store where Conery worked. On August 16, 1990, DiChristina filed a complaint in the Passaic Municipal Court against Conery arising out of an argument occurring at Conery's place of employment on August 15, 1990. On or about September 1, 1990, Conery filed a cross-complaint in the Passaic Municipal Court against DiChristina. Conery admitted that he filed the cross-complaint solely because DiChristina filed a complaint against him.

On May 22, 1991, the matters were tried in the Passaic Municipal Court. After hearing testimony from both parties, the Municipal Court Judge ruled that DiChristina was not guilty with respect to the charge filed by Conery and that Conery was not guilty with respect to the

charges filed by DiChristina. The Municipal Court Judge imposed sanctions against Conery in the amount of $400 for his failure to appear at a previously scheduled trial date.

2. Conery's Handbilling on October 21, 1991

On October 21, 1991, Conery and a friend of his affixed political handbills critical of Local 464A's incumbent officers to cars parked in Local 464A's parking lot as well as cars parked on the street adjacent to the Union hall. The handbills were put in door handles, under windshield wipers, on radio antennae and, as stated by Conery: "wherever I thought it was applicable at the time. Wherever it was easiest to put." Local 464A members attending a shop steward seminar at the Union hall on that date complained to Local 464A officers that Conery had damaged their vehicles (*e.g.*, broken windshield wipers) when placing his handbills on them, and requested that Conery not further touch their automobiles.

Dr. Anthony Boni, a dentist and a tenant in the Local 464A building, also complained to Local 464A about Conery's handbilling on October 21, 1991. Dr. Boni's concern was triggered by separate complaints by two of his patients within a 10 to 15 minute period on that date, complaining about Conery's flyers which they found on their cars.

As a result of the complaints by Local 464A members and Dr. Boni, Local 464A called the Little Falls Police. The Little Falls police responded and advised Conery that there was a handbill ordinance in Little Falls prohibiting distribution of the handbills. Niccollai advised the police officer that he was not concerned with Conery's distribution of his written material so long as he did not damage

the property of others. Thereafter, the officer allowed Conery to distribute his handbills on the sidewalk.[7]

After consulting with his attorney, Dr. Boni filed a complaint in the Little Falls Municipal Court charging Conery with a violation of Local Ordinance 6.1-7 (Handbills). Boni's Complaint was dismissed by the Municipal Court Judge at the request of the municipal prosecutor. The Municipal Court Judge stated at that time:

> Okay, Mr. Conery, I'm sure you're well aware now you cannot do what you did. If you do it in the future, I will not permit a withdrawal of the complaint or a dismissal of the complaint do you understand that? And, I'll insist that the complaint be prosecuted.

3. DiChristina Remarks

Conery claims that DiChristina made certain provocative remarks to him in late 1991 in an attempt to create grounds for disciplining Conery in violation of his LMRDA rights. Although Conery claims that DiChristina called him "asshole", "jerk", "erratic", "ungentlemanly", and "a bullshitter", Conery admitted that the name calling was two-sided, that there were no witnesses to the alleged verbal harassment and that he did not remember when the remarks were made.

4. Local 464A's Complaint in the District Court

On March 5, 1990, Local 464A filed a civil action against Conery in the United States District Court for the District of New Jersey ("Local 464A Complaint"). At various times in the late summer and fall of 1990, Conery

---

[7] From the testimony by Conery and others, it appears by this time Conery had already placed his campaign literature on every car in the parking the lot and along the street.

requested Niccollai to dismiss the Local 464A Complaint. As a result of those requests, on December 18, 1990, Local 464A filed a motion to voluntarily dismiss the Local 464A Complaint.

Notwithstanding the fact that Conery was represented by counsel, on December 31, 1990, Conery filed a *pro se* objection to Local 464A's motion for voluntary dismissal and sought leave to file a counterclaim. On January 14, 1991, Local 464A filed a response to Conery's *pro se* filing. On January 22, 1991, Conery filed additional papers in opposition to Local 464A's motion for voluntary dismissal.

On February 1, 1991, the attorneys representing Conery with respect to the Local 464A Complaint filed a motion for leave to withdraw as counsel for Conery.

On February 8, 1991, Conery submitted a handwritten letter to the District Court Judge in connection with his request to file a counterclaim.

On February 25, 1991, the District Court entered an Order granting Local 464A's motion to voluntarily dismiss the Local 464A Complaint and simultaneously granted the motion by Conery's attorneys to withdraw as counsel for Conery. On March 27, 1991, the District Court entered an order denying Conery's application for leave to file a counterclaim.

ARGUMENT

I. THE THIRD CIRCUIT PROPERLY APPLIED THE SUPREME COURT'S RULINGS IN *CALHOON* AND *LYNN* IN AFFIRMING THE DISTRICT COURT'S DISMISSAL OF PETITIONER'S CLAIMS UNDER LMRDA §101(a)(1) AND §101(a)(2)

In affirming the dismissal of Petitioner's LMRDA §101(a)(1) and (2) claims, the Third Circuit relied upon the holdings of *Calhoon v. Harvey*, 379 U.S. 134, 13 L.Ed. 2d 190, 85 S. Ct. 292 (1964), *reh. den.*, 379 U.S. 984, 13 L.Ed. 2d 577, 85 S. Ct. 639 (1965), and *Sheet Metal Workers v. Lynn*, 488 U.S. 347, 102 L.Ed. 2d 700, 109 S. Ct. 639

(1989). The Third Circuit also determined that the Report, which was adopted by the District Court Judge, correctly set forth the factual background relating to Petitioner's claims. (Pet. App. at 5a, n.1). Applying the holdings of *Calhoon* and *Lynn* to the facts, the Third Circuit appropriately concluded:

> Conery participated fully in union elections and spoke his mind. He ran for office and supported other candidates. None of the actions of the Local 464A officials interfered with Conery's rights to vote for and nominate candidates, nor did he present evidence establishing interference with the democratic governing of the union. (Pet. App. at 8a).

A. The Third Circuit Correctly Affirmed the Dismissal of Petitioner's Claims Alleging Violations of §101(a)(1)

LMRDA §101(a)(1), codified at 29 U.S.C. §411(a)(1), provides, in pertinent part:

> Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of a labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

The scope and application of this section of the LMRDA was analyzed by this Court in *Calhoon*. In *Calhoon*, Justice Black delivered the opinion of the Court, stating:

> All that §101(a)(1) guarantees is that "every member of a labor organization shall have equal rights and privileges . . . to nominate candidates, to vote in elections or referendums of the labor organization . . . and to participate in the deliberations and voting . . . subject to reasonable

> rules and regulations in such organization's constitution and bylaws."
>
> Plainly, this is no more than a command that members and classes of members shall not be discriminated against in their right to nominate and vote. And Congress carefully prescribed that even this right against discrimination is "subject to reasonable rules and regulations" by the union.

Id., 379 U.S. at 138-39, 13 L.Ed. 2d 193-194.

In affirming the dismissal of the *Calhoun* plaintiffs' complaint, this Court found that:

> The complaining union members here have not been discriminated against in any way and had been denied no privilege or right to vote or nominate which the union has granted to others. They have indeed taken full advantage of the uniform rule limiting nominations by nominating themselves for office.

Id., 379 U.S. at 139.

Here, Petitioner has never alleged, much less produced a scintilla of evidence, that he has been discriminated against in his ability to nominate or vote. To the contrary, Petitioner has, to an extent even greater than the plaintiffs in *Calhoon*, fully participated in Local 464A's political processes by, *inter alia:*

- being nominated and elected to Local 464A's contract negotiating committee in April 1987;
- campaigning for and supporting candidates in the 1989 and 1992 elections;
- participating in the 1989 and 1992 elections;
- contesting the 1989 and 1992 elections with the Local, the International Union and the DOL;
- proclaiming his own candidacy and seeking the nomination for the office of president in 1992;
- being nominated for the office of president in 1992;

- campaigning for the office of president in 1992;
- contesting the 1995 election with the DOL;
- distributing literature in support of his campaign, and the campaign of others and in opposition to the incumbent officers during the period 1987 through 1992; and
- organizing opposition to the incumbent officers and their platform during the period 1989 through 1992.

The Third Circuit properly ruled that Petitioner failed to allege or demonstrate the discrimination necessary to maintain a cause of action under §101(a)(1), as required by *Calhoon*. It correctly applied the controlling law and affirmed the dismissal of Petitioner's §101(a)(1) claims. Since the Third Circuit's interpretation and application of §101(a)(1) is entirely consistent with this Court's binding precedent, this Court should deny the Petition for Writ of Certiorari.

B. The Third Circuit Correctly Affirmed the Dismissal of Petitioner's Claims Alleging Violations of §101(a)(2)

LMRDA §101(a)(2), codified at 29 U.S.C. §411(a)(2), provides, in pertinent part:

> Every member of any labor organization shall have the right . . . to express any views, arguments or opinions. . . . Provided, that nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

This Court has analyzed the scope and application of §101(a)(2) and has established a two-prong test to determine whether a §101(a)(2) violation has occurred. *Lynn*, 488 U.S. at 354; *Finnegan v. Leu*, 456 U.S. 431, 440 (1982). The first prong requires a determination be made that the

challenged action interfered with the exercise of the union member's rights. *See Lynn*, 488 U.S. at 354. The second prong of the analysis, which is applied only if there is a finding of interference with the union member's rights, was set forth as follows:

> This is not, of course, the end of the analysis. Whether such interference with Title I rights give rise to a cause of action under §102 must be judged by reference to the LMRDA's basic objective: "to ensure that unions [are] democratically governed, and responsive to the will of the union membership as expressed in open, periodic elections".

Id., 488 U.S. at 354 (citation omitted) (bracket in original).

This Court's two-prong §101(a)(2) analysis is unquestionably applicable to Petitioner's claims. It is an analysis which the Ninth Circuit Court of Appeal applied in *Teamsters Joint Council No. 42 v. IBT, AFL-CIO*, 82 F.3d 303 (9th Cir. 1996). There, the court stated:

> The Supreme Court has established a two part test for analyzing the speech protections of §101(a)(2). See *Sheet Metal Workers' v. Lynn*, ... We first determine "whether petitioners' 'rights secured' under Title I were 'infringed'" by the alleged action. . . .
>
> Even if the partitioning infringed rights protected by Title I of the LMRDA, "[t]his is not of course the end of the analysis." . . . Step two of the analysis requires that the alleged interference "be judged by reference to the LMRDA's basic objective: 'to ensure that unions [are] democratically governed and responsive to the will of the union membership[].'"

Teamsters Joint Council No. 42, 82 F.3d at 305-306 (citation omitted). Petitioner's claim that the Third Circuit misinterpreted *Lynn* (P10) is totally without merit.

The record in this case unquestionably demonstrates that Petitioner does not meet either prong of the two-prong test articulated by this Court in *Lynn* and *Finnegan*.

There was no interference with Petitioner's §101(a)(2) membership rights, and even if Petitioner's rights were infringed (which they were not), the record does not in any way support a claim that there was any interference with the democratic governance of the Union.

Since the Third Circuit's interpretation and application of §101(a)(2) is entirely consistent with this Court's binding precedent, this Court should deny the Petition for Writ of Certiorari.

II. THERE IS NO CONFLICT BETWEEN THE THIRD CIRCUIT'S RULING IN THIS CASE AND DECISIONS IN OTHER CIRCUITS INTERPRETING LMRDA §101(a)(1) AND §101(a)(2)

A. Petitioner's §101(a)(1) Argument is Meritless

In an effort to convince this Court that the Third Circuit's decision in this case is in conflict with the decisions of other Circuit Courts of Appeal with respect to the interpretation of §101(a)(1), Petitioner argues that generic pronouncements by Circuit Courts of Appeal regarding the purposes of the LMRDA and the need to liberally construe remedial legislation establish the conflict of which he complains. As additional support for his "conflict in the Circuit Courts" theory, Petitioner offers the untenable argument that *Calhoon* did not interpret §101(a)(1).

A review of the cases cited by Petitioner (P5-6) reveals that, other than *Smith v. United Mine Workers*, 493 F.2d 1241 (10th Cir. 1974), none of the cases address the interpretation or application of §101(a)(1). *Burroughs v. Operating Engineers Local Union No. 3*, 686 F.2d 723 (9th Cir. 1982) (P5), involved a claim under §101(a)(3). *Schuchardt v. Millwrights & Machinery Erectors Local No. 2834*, 380 F.2d 795 (10th Cir. 1967) (P5-6), made only generic reference to the basic purpose of Subchapter II – Bill of Rights of Members of Labor Organizations. *Hall v. Cole*, 412 U.S. 1, 93 S. Ct. 1943 (1973) (P5), focused on the District Court's authority to award attorney's fees to a successful plaintiff in an LMRDA case. *International*

Brotherhood of Boilermakers, et al. v. Braswell, 388 F.2d 193 (5th Cir.), *cert. den.* 391 U.S. 935 (1968) (P6), was concerned with a §101(a)(5) issue and is apparently cited by Petitioner for the general statement that remedial legislation should be liberally construed. And, finally, *Marshall v. Local 1010*, 498 F. Supp. 368 (N.D. Ind. 1980), *aff'd* 664 F.2d 144 (7th Cir. 1981) (P6), like *Schuchardt*, was cited by Petitioner for its statement of the underlying purposes of the LMRDA.

The one case that addressed §101(a)(1), *Smith*, not only cited *Calhoon*, but found that no violation of §101(a)(1) existed since the plaintiff had not proven that the union had engaged in any type of discrimination. Interestingly, the court in *Smith* noted:

> The rights guaranteed by the Act [LMRDA] are specific. Congress did not intend that the Act [LMRDA] be an invitation to the courts to intervene at will in the internal affairs of unions.

Smith, 493 F.2d at 1244 (citation omitted).

Clearly, the Third Circuit's application of *Calhoon* to the facts in this case is not in conflict with the decisions cited by Petitioner in support of his "conflict in the Circuit Courts" argument.

Moreover, to the extent that Petitioner argues that *Calhoon* was a jurisdictional case and therefore the Third Circuit was wrong when it applied the holding in *Calhoon* to affirm the dismissal of Petitioner's §101(a)(1) claims, his argument is specious. This Court's decision on the jurisdictional question raised in *Calhoon* was intricately interwoven with the interpretation and analysis of §101(a)(1). Describing the means by which the Court would reach its ultimate decision on jurisdiction, Justice Black stated:

> An analysis and understanding of the meaning of §101(a)(1) . . . [is] essential to a determination of this [jurisdictional] issue.

Calhoon, 379 U.S. at 138.

The Third Circuit's reliance on *Calhoon*'s interpretation of §101(a)(1) in dismissing Petitioner's §101(a)(1) claims is unassailable. *See* Point I.A., *supra*.

In addition to his futile attempt to avoid *Calhoon*'s interpretation of §101(a)(1) by characterizing *Calhoon* as a jurisdictional case, Petitioner also attempts to escape the controlling holding of *Calhoon* by arguing that *Calhoon* was not a case which involved a violation of the free speech rights provided by §101(a)(2). This is nothing more than a red herring.

Petitioner advanced claims under both §101(a)(1) and §101(a)(2). The Third Circuit, like the District Court Judge and the Magistrate, considered and analyzed Petitioner's claims under both provisions. In doing so, each court found that Petitioner failed to substantiate a claim under either section of the LMRDA. Petitioner's contention that *Calhoon* is not applicable to his claim because *Calhoon* did not involve a §101(a)(1) and §101(a)(2) claim lacks even a semblance of merit.

The Third Circuit's decision in this case affirming the dismissal of Petitioner's §101(a)(1) claims is consistent with this Court's holding in *Calhoon* and is not in conflict with the decisions in other circuits. The Petition for Writ of Certiorari should be denied.

B. The Third Circuit Did Not Rule That §101(a)(2) Applies Only In The Context Of Union Election

In pursuing his ineffective effort to persuade this Court that a conflict exists between the Third Circuit's interpretation to §101(a)(2) in this case and the decisions of other circuits with respect to §101(a)(2), Petitioner completely mischaracterizes the Third Circuit's decision. In apparent recognition that a frontal attack on the Third Circuit's decision is impossible, Petitioner attempts to soften his argument by couching it as follows:

> The *implication* in the Third Circuit's holding that the free speech provisions of §101(a)(2) apply only in the context of a union election . . . conflicts with decisions in [other circuits]. (P7-8) (emphasis added).

Moreover, Petitioner's mischaracterization of the Third Circuit's §101(a)(2) analysis intentionally ignores the Third Circuit's description of the claims advanced by Petitioner in the Conery §101 Complaint. In the Statement of Facts section of its opinion, the Third Circuit specifically noted:

> Conery maintains that various officers of Local 464A organized and executed a campaign of harassment against him in response to Conery's dissident activities in Local 464A, including Conery's decision to run for president in Local 464A's elections in 1989 and 1992. According to Conery, this harassment included (a) the filing of a civil RICO lawsuit in retaliation for Conery's dissident union activities; (b) the filing of an assault charge in Municipal Court to "convince" him to stop participating in union affairs; and (c) the verbal and physical harassment of Conery dating back to April of 1987 in order to suppress dissent within the union. (Footnote omitted).

(Pet. App. at 5a).

It is clear from the foregoing that the Third Circuit understood, without question, that Petitioner's allegations included claims that as a result of his dissident activities, he became the subject of a campaign of harassment which was allegedly designed to suppress dissent within the Union. (Pet. App. at 5a). Nowhere in the Third Circuit decision did that court ever suggest that Petitioner's §101(a)(2) claims were limited only to his activities relating to Union elections. To the contrary, the Third Circuit recognized that Petitioner's claims encompassed a wide array of allegations of harassment, some of which he claimed were designed "to 'convince' him to stop participating in union affairs" while others "dating back to April of 1987" were designed to suppress dissent within the Union. (Pet. App. at 5a).

In his Petition, Petitioner ignores the fact that the summary judgment record upon which the Third Circuit based its decision dismissing Petitioner's §101(a)(2) claims, unquestionably revealed that, notwithstanding Petitioner's

allegations, Petitioner had not and could not prove a violation of §101(a)(2).

In recognition of the indisputable nature of the Third Circuit's holding as it was written by that court, Petitioner stoops to inventing a "holding" that bears no resemblance to the Third Circuit's ruling in this case and is nothing more than a transparent attempt to bolster his "conflict in the Circuit Courts" argument. In that regard, Petitioner claims that the Third Circuit "held" the following with respect to his §101(a)(2) claims:

> The Third Circuit in this case *held* that the free speech guarantees of Title I provide a statutory cause of action *only* for dissenting union members who succumb to union harassment, but not for the Conerys of this world who bravely persist to the end by running for union office and supporting opposition candidates. (footnote omitted) (emphasis added) (P9–10).

Petitioner's gross mischaracterization of the Third Circuit's ruling[8] is brought into sharp focus when Petitioner's "holding" is juxtaposed against the Third Circuit's actual ruling which pronounced:

> As set forth in detail in the Report, Conery participated in union elections and spoke his mind. He ran for office and supported other candidates. None of the actions of the Local 464A officials interfered with Conery's rights to vote for and nominate candidates, nor did he present evidence establishing interference with the democratic governing of the union. The Report did not mischaracterize the facts or misinterpret the law and was properly adopted by the District Court.

(Pet. App. at 8a).

---

[8] In accordance with Rule 15.2 of the Supreme Court Rules, Respondents point out that Petitioner's version of the Third Circuit's holding with respect to his §101(a)(2) claims is perceived by Respondents to be a misstatement.

Clearly, the absence of any resemblance between the Third Circuit's actual ruling and Petitioner's characterization of the holding is startling. Petitioner's motive for this mischaracterization is found in the Fifth Circuit case which he claims is in conflict with the Third Circuit's decision. In *Guidry v. International Union of Operating Engineers, Local 406*, 882 F.2d 929 (5th Cir. 1989), the court noted with respect to §101(a)(2) that:

> The statute itself speaks of the right of every union member to "express any views, arguments or opinions," 29 U.S.C. §411(a)(2), . . . and does not limit such expression to one occurring in the context of a union election.

Guidry, 882 F.2d at 936.

Again, the Third Circuit's opinion did not directly, indirectly, or by implication, hold that the free speech provisions of §101(a)(2) is limited to speech relating directly to a union election. As set forth above, the Third Circuit's opinion summarized the facts set forth in detail in the Magistrate's Report. (*See* Pet. App. at 13a to 20a). Both the Third Circuit's opinion, as well as the Statement of Facts in the Report, make it absolutely clear that the Third Circuit, in rendering its opinion, was addressing all of Petitioner's claims, not just those limited to his complaints relating directly to the Local's elections.

Petitioner's attempt to "bootstrap" an argument that a "conflict in the Circuit Courts" exists by misrepresenting the substance of the Third Circuit's holding with respect to Petitioner's §101(a)(2) claims is calculating, intellectually dishonest and meritless.

Furthermore, the Circuit Court decisions alleged by Petitioner to be in conflict with the Third Circuit decision here, present no such conflict. *Guzman v. Bevona*, 90 F.3d 641 (2d Cir. 1996) (P8), involved a claim by a union member against his union, its president and various union officers alleging a violation of §101(a)(2) based upon the prolonged surveillance of the union member by a private investigating firm hired by the union. The Second Circuit upheld a jury verdict that the surveillance of the plaintiff

had the effect of infringing on his right to free speech and thus violated §101(a)(2). *Id.* at 649. The *Guzman* court did not discuss or apply *Lynn*. Moreover, in affirming the jury verdict rendered in *Guzman*, the Second Circuit distinguished an earlier Second Circuit case, *Newman v. Local 1101, Communications Workers*, 570 F.2d 439 (2d Cir. 1978), a case which is on all fours with the matter presently before this Court.[9]

Guzman dealt with a set of facts not even remotely similar to those in this matter. The Second Circuit's decision in *Guzman* is not in conflict with the Third Circuit's opinion. In fact, the Second Circuit's ruling in *Newman* is entirely consistent with the Third Circuit's decision here.

In *Aircraft Mechanics v. Transport Workers Union*, 98 F.3d 597 (10th Cir. 1996) (P8), the Tenth Circuit upheld the trial court's determination that the union's suspension of the individual plaintiff's membership rights was reasonable. The court found that §101(a)(2) guarantees a

---

[9] In *Newman*, the Second Circuit found no interference with plaintiff's §101(a)(2) rights where plaintiff's exercise of those rights was not interrupted. Like Petitioner, Newman historically had a turbulent relationship with his union's management, allegedly arising from his continued opposition to the incumbent officers. Like Petitioner, Newman spoke out against the incumbents, distributed literature critical of their actions and ran as an opposition candidate in the union election. During this same period of time, the union decertified Newman from his position as an elected shop steward. As a result of his decertification, Newman filed suit seeking relief under §101(a)(2) of the LMRDA. *Id.* at 448-449.

The court in *Newman* found that "Newman continued to exercise his free speech rights as a union member, conducting vigorous campaigns for greater democratization in opposition to Local 1101's incumbent leadership." Consequently, the court held:

> In view of this unique record, in which identical conduct by the defendants had not deterred Newman or any other union members from exercising their rights under LMRDA, we do not believe that judicial intervention is necessary or justified. *Id.* at 448.

union member the right to meet and assemble freely and to express views, arguments or opinions but also recognized that the statute provides that "Nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal and contractual obligations." *Id.* at 600. In *Aircraft Mechanics*, the individual plaintiff engaged in "dual unionism" when, while a member of the defendant Transport Workers Union, he executed an election authorization card on behalf of Aircraft Mechanics. This conduct violated the Transport Workers Union's constitutional provisions which prohibited advocating withdrawal from the union or promoting a rival union. In affirming the dismissal of the §101(a)(2) claims advanced by the individual plaintiff, the Tenth Circuit determined that the Transport Workers Union's constitutional provision was reasonable and that the individual plaintiff's conduct was contrary to the "institutional interests of a union in which he voluntarily retained membership." *Id. Aircraft Mechanics* does not in any way support Petitioner's "conflict in the Circuit Courts" argument.

Finally, in *Black v. Ryder/P.I.E. Nationwide,* 970 F.2d 1461 (6th Cir. 1992) (P8), the Sixth Circuit affirmed (in relevant part) a jury verdict in favor of the plaintiff who claimed that the union violated §101(a)(2) by punishing the plaintiff for organizing a picket line at the union hall opposing union leadership. As a result of the plaintiff's actions, he and others were disciplined and subjected to employment-related reprisals. The Sixth Circuit's action, like the action of the Second Circuit in *Guzman*, affirming a jury verdict in a case whose facts bear no similarity to the facts in this matter, does not advance Petitioner's argument. The fact sensitive decision in *Black* is not in conflict with the Third Circuit's decision here.

The Third Circuit's decision in this case affirming the dismissal of Petitioner's §101(a)(2) claims is not in conflict

with §101(a)(2) decisions in other Circuits. The Petition for Writ of Certiorari should be denied.

CONCLUSION

For all of the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JOHN M. AGNELLO
CARELLA, BYRNE, BAIN,
GILFILLAN, CECCHI,
STEWART & OLSTEIN
6 Becker Farm Road
Roseland, New Jersey 07068
(973) 994-1700
Attorneys for Respondents

Dated: September 27, 2002

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

John M. Agnello (JMA0338)
CARELLA, BYRNE, BAIN, GILFILLAN,
CECCHI, STEWART & OLSTEIN
6 Becker Farm Road
Roseland, New Jersey 07068
(973) 994-1700
Attorneys for Defendants

WILLIAM J. CONERY, et al., Plaintiffs, v. JOHN NICCOLLAI, JR., et al., Defendants.	CIVIL ACTION NO. 92-840 (JAG) Consolidated **JUDGMENT** (Filed Sep. 27 2001)

This matter having come before the Court for the purpose of entering Judgment pursuant to Fed. R. Civ. P. 58 based upon a series of summary judgment orders which were previously filed in this consolidated action on September 27, 1994 (Hon. John C. Lifland, U.S.D.J.), March 31, 1998 (Hon. Joseph A. Greenaway, Jr., U.S.D.J.), May 20, 1998 (Hon. Joseph A. Greenaway, Jr., U.S.D.J.), May 20, 1998 (Hon. Joseph A. Greenaway, Jr., U.S.D.J.), and May 20, 1998 (Hon. Joseph A. Greenaway, Jr., U.S.D.J.), and an order filed on June 29, 2001 (Hon. Joseph A. Greenaway, Jr., U.S.D.J.) entering a monetary judgment in favor of defendant Local 464A, United Food and Commercial Workers

Union and against plaintiff Frank A. Fusco, and all issues in this consolidated action having been duly heard and decisions having been rendered,

It is on this 27th day of September 2001, Ordered and Adjudged as follows:

That the plaintiffs, William J. Conery, Frank A. Fusco, and Kenneth Burdge, take nothing and that their complaints in this consolidated action be dismissed on the merits.

That the defendant, Local 464A, United Food and Commercial Workers Union, recover the sum of $339,191.41 on its counterclaim against Frank A. Fusco, with interest thereon as provided by law, together with costs as taxed by the Clerk.

/s/ Joseph A. Greenaway, Jr.
JOSEPH A. GREENAWAY, JR.,
U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 01-2870

WILLIAM J. CONERY; FRANK A. FUSCO;
KENNETH BURDGE

v.

JOHN NICCOLLAI, JR., individually and in his official capacity as President of Local 464A, Food and Commercial Workers Union, AFL-CIO; RAMON RANDO, individually and in his official capacity as Secretary-Treasurer of Local 464A; GRIFF MCELROY, individually and in his capacity as Recorder of Local 464A; GEORGE PLESA, individually and in his official capacity as Chairman of the Executive Board of Local 464A; FRANK HANLEY, individually and in his official capacity as Contract Administrator; FRANK DICHRISTINA; DONALD LIGON; WILLIAM WRIKER, individually and in their official capacities as Business Agents of Local 464A; UNITED FOOD COMMERCIAL WORKERS UNION, AFL-CIO; SHOPRITE SUPERMARKETS, INC.; WALTER BIERNACKI, individually and in his official capacity as Vice President of Local 464A; WAYNE WILLIAMS, individually and in his capacity as Director – Pension & Prescription Benefits of Local 464A; JOHN T. NICCOLAI, SR., individually and in his capacity as Trustee of the Local 464A Pension Fund; LOCAL 464A, UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO; LOCAL 464A PENSION FUND ADMINISTRATOR AND BOARD OF TRUSTEES; MARTIN QUINN, in their capacity as administrators and trustees of the Local 464A Pension Fund; GILBERT C. VUOLO, in

their capacity as administrators and trustees of the Local 464A Pension Fund; DEWEY CANNELLA, in their capacity as administrators and trustees of the Local 464A Pension Fund; ISADORE ZALKIN, in their capacity as administrators and trustees of the Local 464A Pension Fund

v.

JOHN NICCOLLAI, JR.; RAMON RANDO; GRIFF MCELROY; GEORGE PLESA; FRANK HANLEY; FRANK DICHRISTINA; DONALD LIGON; WILLIAM WRIKER; WAYNE WILLIAMS; JOHN T. NICCOLAI, SR.; MARTIN QUINN; GILBERT C. VUOLO; DEWEY CANNELLA; ISADORE ZALKIN; WALTER BIERNACKI,

Third Party Plaintiffs

v.

HAROLD KRIEGER, The Estate of Harold Krieger; STEPHANIE KRIEGER; LOWELL HARDWOOD, as Executors of the Estate of Harold Krieger,

Third Party Defendants

(D.C. No. 92-cv-00840)

FRANK A. FUSCO; KENNETH BURDGE

v.

JOHN T. NICCOLAI, JR., individually and in his capacity as President of local 464A, United Food and Commercial Workers International Union, and as Trustee of the Local 464A Pension Fund; RAMON RANDO, individually and in his capacity as Secretary-Treasurer of Local 464A and as Trustee of the Local 464A Pension Fund; GRIFF MCELROY, individually and in his capacity as Recorder of Local 464A; FRANK HANLEY, individually and in his

capacity as Contract Administrator of Local 464A; WAYNE WILLIAMS individually and in his capacity as Director – Pension & Prescription Benefits of Local 464A; JOHN T. NICCOLAI, SR., individually and in his capacity as Trustee of the Local 464A Pension Fund; LOCAL 464A, UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO; LOCAL 464A PENSION FUND ADMINISTRATOR AND BOARD OF TRUSTEES; WALTER BIERNACKI, individually and in his capacity as Vice President of Local 464A and as Trustee of the Local 464A Pension Fund; MARTIN QUINN, in their capacity as administrators and trustees of the Local 464A Pension Fund; GILBERT C. VUOLO, in their capacity as administrators and trustees of the Local 464A Pension Fund; DEWEY CANNELLA, in their capacity as administrators and trustees of the Local 464A Pension Fund; ISADORE ZALKIN, in their capacity as administrators of the Local 464A Pension Fund;

(D.C. No. 92-cv-01458)

William J. Conery,
Appellant

Appeal from the United States District Court
for the District of New Jersey, Newark
(D.C. Civ. Nos. 92-CV-840 & 92-CV-1458)

Before: SCIRICA and COWEN, *Circuit Judges*,
RESTANI*, *Judge*, United States
Court of International Trade

AMENDED JUDGMENT

This cause came on to be heard from the United States District Court for the District of New Jersey, Newark.

On consideration whereof, it is now hereby ADJUDGED and ORDERED by this court that the Rule 58 judgment of the district court entered on September 27, 2001, be and the same is hereby affirmed.

Costs taxed against appellant.

ATTEST:

/s/ Marcia M. Waldron
Marcia M. Waldron, Clerk

DATED: May 28, 2002

Costs taxed in favor of Appellees
John Niccollai, et al. as follows:

---

* Honorable Jane A. Restani of the United States Court of International Trade, sitting by designation.

Briefs	$ 135.60
44% of Appendix	$1,627.34
Sales Tax	$ 8.14
TOTAL	$1,771.08

Certified as a true copy and issued in lieu of a formal mandate on May 28, 2002

Teste: /s/ Marcia M. Waldron

Clerk, United States Court of Appeals for the Third Circuit